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REPORT OF THE EXPERT MEETING ON EXISTING AGREEMENTS ON INVESTMENT AND THEIR DEVELOPMENT DIMENSIONS

Held at the Palais des Nations, Geneva,
from 28 to 30 May 1997

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I. AGREED CONCLUSIONS

1. At its closing meeting, on 30 May 1997, the Expert Meeting on Existing Agreements on Investment and their Development Dimensions adopted the following agreed conclusions on item 3 of its agenda: 1/

Examine and review existing agreements on investment and their development dimensions in pursuance of the mandate of paragraph 89(b) of "A Partnership for Growth and Development"

(Agenda item 3)

The Expert Meeting reviewed bilateral investment treaties in pursuance of the mandate given in paragraph 89 (b) of "A Partnership for Growth and Development" to identify and analyse implications for development of issues relevant to a possible multilateral framework on investment. It focused on five sets of issues, i.e. reasons for concluding bilateral investment treaties; issues addressed by bilateral investment treaties; experience with the application of bilateral investment treaties; the role of bilateral investment treaties in the development of national law and standards of international law; and the development dimensions. The Expert Meeting had a broad and useful discussion, though some questions deserve additional attention, such as the provisions in bilateral investment treaties which contribute to attracting foreign investment and at the same time address development concerns. It was considered that similar work to that undertaken by the current Expert Meeting but dealing with existing regional and multilateral agreements on investment is needed to obtain a more complete picture of existing agreements on investment, in pursuance of the mandate of paragraph 89(b) in "A Partnership for Growth and Development".

1/ Initially circulated in TD/B/COM.2/EM.1/4.

II. CHAIRMAN'S SUMMARY OF THE INFORMAL DISCUSSIONS ON AGENDA ITEM 3 2/

The discussions of the Expert Meeting were structured according to the following five themes:

A. Main reasons for concluding bilateral investment treaties

1. Most experts who spoke observed that, for host countries, the most important purpose of bilateral investment treaties is to attract foreign investment in the interest of development. Bilateral investment treaties may contribute to that objective in a variety of ways, especially by helping to establish a favourable investment climate, building confidence and sending a positive signal to investors. Experts also observed that, for home countries, the most important purpose of bilateral investment treaties is to secure predictable conditions for their investment abroad, including certain standards of treatment and protection, and independent third-party means for the settlement of investment disputes. It was noted that bilateral investment treaties, as a rule, do not commit home countries to take concrete action to promote investment flows to developing countries. The objectives of any particular country may change over time as its role as a home and host country evolves.

2. There were some comments on the advantages and disadvantages of bilateral and multilateral investment frameworks. According to some experts, among the advantages of a bilateral framework were that bilateral investment treaties could be tailored to the specific circumstances of the two parties and are relatively easy to conclude. Some other experts were of the opinion that the advantages of a multilateral framework included greater stability and transparency and a better opportunity for smaller and developing countries to exercise their collective bargaining power with a view ensuring that the developmental dimension is fully taken into account. While some experts questioned the need for a multilateral framework, others supported it. Some experts expressed concern about the unequal position of developing countries and small States in bilateral negotiations; similar concerns were expressed about multilateral frameworks, especially if they did not sufficiently address the development dimension.

B. Issues addressed by bilateral investment treaties

3. Some experts commented on existing disciplines in bilateral investment treaties and explored the possibility of additional commitments. Bilateral investment treaties typically contain provisions guaranteeing fair and non-discriminatory treatment for investment, protecting investment against expropriation and other forms of non-commercial risk, and establishing mechanisms for third-party dispute resolution. Some bilateral investment treaties include other clauses, such as restrictions on performance requirements, provisions to promote transparency of national law and balance-of-payments issues.

2/ At its closing plenary meeting, on 30 May 1997, the Expert Meeting agreed that the Chairman's summary would constitute the substantive part of the report of the Expert Meeting. The Chairman's summary was initially circulated in TD/B/COM.2/EM.1/5.

4. There are a number of other investment-related issues that bilateral investment treaties do not always cover, but which may need to be addressed although, in the view of some experts, not necessarily by bilateral investment treaties. These include restrictive business practices, environmental standards, social responsibilities of investors and obligations for progressive liberalization.

C. Experience with the application of bilateral investment treaties

5. Many experts noted that there is very little practical experience with the use of bilateral investment treaties and the information available on their application is mostly anecdotal. Bilateral investment treaties' provisions for third-party dispute settlement may, in the view of some experts, induce settlement through negotiations and thus prevent disputes from maturing. This may be the reason why, although many bilateral investment treaties provide for settlement of disputes by the International Centre for Settlement of Investment Disputes (ICSID), the resort to ICSID has been relatively infrequent. It was pointed out that dispute settlement should be accessible and affordable. It was also stated by some that bilateral investment treaties were relatively unknown among investors (as opposed to providers of finance and insurance), although investors are concerned about the issues that bilateral investment treaties address.

D. The role of bilateral investment treaties in the development of national law and standards of international law

6. Several experts observed that bilateral investment treaties typically address the same topics in much the same terms, though there are important differences among them. Bilateral investment treaties often reflect, and are consistent with, provisions of national law; in other cases, bilateral investment treaties influence national law by virtue of the laws which Parties enact to meet the requirements of the treaties. While bilateral investment treaties constitute lex specialis, establishing treaty rights and obligations for the Parties, some experts questioned to what extent bilateral investment treaties would or could give rise to rules of customary international law.

E. The development dimension

7. There was general agreement that the increasing number of bilateral investment treaties has resulted from the recognition of the positive role that foreign investment can play in economic development. While some experts observed a correlation between the conclusion of bilateral investment treaties and the growth of foreign investment, many others were unable to establish such a connection. Thus, the view was expressed that, while bilateral investment treaties may contribute to the growth of investment, they are only a tool, one factor in creating a favourable investment climate. Other factors that may play a greater role in attracting foreign investment include the size and growth of the market, the quality of infrastructure and skills, political, economic and legal stability, and the new parameters of a globalizing world economy.

8. Many experts observed that bilateral, regional and multilateral frameworks for investment must take into account a host country's developmental objectives. For this reason, some experts considered that investment frameworks need to strike a balance between providing predictable conditions for investment abroad and reserving for host countries the flexibility to pursue their economic development in the framework of their own laws; as regards the latter, agreements

should indeed be constructed in a manner that promotes the economic development objectives of developing countries. Finding a balance between the rights and responsibilities of home countries, host countries and investors begins with an appropriate approach towards liberalization and transparency of measures in general, on the one side, and, on the other, a balanced set of commitments between home and host countries, taking into account the definition of investment, the role of home countries in facilitating investment through insurance programmes, incentives or otherwise, the importance of technology transfer and technology upgrading, the importance of high-quality investment especially in priority sectors, environmental and consumer protection, the control of restrictive business practices, performance requirements, the development of local enterprises in host countries and the social responsibilities of investors. There is also the questions of freedom for movement of capital and the freedom for movement of persons.

9. From a developing country's perspective, the ultimate test of any investment agreement is its development friendliness.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

1. In accordance with the agreed conclusions adopted by the Commission on Investment, Technology and Related Financial Issues at the closing meeting of its first session on 7 February 1997,3/ the Expert Meeting on Existing Agreements on Investment and their Development Dimensions was held at the Palais des Nations, Geneva, from 28 to 30 May 1997. The Meeting was opened on 28 May 1997 by the Secretary-General of UNCTAD, Mr. Rubens Ricupero.4/

B. Election of officers

(Agenda item 1)

2. At its opening meeting, the Expert Meeting elected the following officers to serve on its Bureau:

Chairman:	Mr. Patrick Robinson (Jamaica)
Vice-Chairman-cum-Rapporteur:	Mr. Tony Sims (United Kingdom of Great Britain and Northern Ireland)

C. Adoption of the agenda

3. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in TD/B/COM.2/EM.1/1. Accordingly, the agenda for the Meeting was as follows:

1. Election of officers

2. Adoption of the agenda

3. Examine and review existing agreements on investment and their development dimensions in pursuance of the mandate of paragraph 89(b) of "A Partnership for Growth and Development"

4. Adoption of the report.

3/ See Report of the Commission on Investment, Technology and Related Financial Issues on its first session (TD/B/44/4-TD/B/COM.2/4), annex I, para. 9(b).

4/ For the opening statement by the Secretary-General of UNCTAD, see annex I below.

D. Documentation

4. For its consideration of the substantive agenda item (item 3) the Expert Meeting had before it a note by the UNCTAD secretariat entitled "Bilateral investment treaties and their relevance to a possible multilateral framework on investment: issues and questions" (TD/B/COM.2/EM.1/2 and Corr.1).

5. The following background documents were also made available:

UNCTAD/DTCI/32	World Investment Report, 1996
UNCTAD/DTCI/30(Vol.I) UNCTAD/DTCI/30(Vol.II) UNCTAD/DTCI/30(Vol.III)	International Investment Instruments: A Compendium
UNCTAD/DTCI/31	Transnational Corporations Vol. 5, No.3, December 1996

E. Adoption of the report

6. At its closing meeting, on 30 May 1997, the Expert Meeting authorized the Rapporteur to prepare the final report of the Meeting under the authority of the Chairman.

ANNEXES

Annex I

OPENING STATEMENT BY THE SECRETARY-GENERAL OF UNCTAD

It is my pleasure to open the Expert Meeting on Existing Agreements Investment and their Development Dimensions. This Expert Meeting is the first meeting convened by the new Commission on Investment Technology and Related Financial Issues created after UNCTAD IX. As such, it could establish a benchmark for other intergovernmental expert meetings under the Commission. Consequently, it offers us an excellent opportunity to explore how we might get the most out of this format in order to pursue our objectives of open discourse and dialogue on a subject of great interest today: international agreements on investment.

The importance of foreign investment in the world economy in general, and in development in particular, has been stated many times. Foreign investment issues and policies are now at the top of the international economic agenda. UNCTAD IX recognized this and identified issues related to foreign investment as a key element in our work programme over the coming years. The Conference gave UNCTAD a special role in helping developing countries in particular to identify and analyse investment trends, issues and policies, and their implications for development. In October 1996, as part of UNCTAD's internal restructuring, the Division on Investment, Technology and Enterprise Development was created. In addition to its role in the analysis of investment trends and policies, the Division has the goal of facilitating foreign direct flows to, and among, developing countries; of fostering the transfer and diffusion of technology and capacity-building in development countries; and of stimulating enterprise development, by strengthening small and medium-sized enterprises in developing countries and countries in transition.

To fulfil these goals the Division promotes international dialogue among development actors for the purpose of assessing the challenges and opportunities for international investment, technology capacity-building and enterprise development arising from new economic conditions, including those related to the conclusions of the Uruguay Round. The present meeting falls squarely within this mandate. UNCTAD IX called for the identification and analysis of the implications for development of issues relevant to a possible multilateral framework on investment. In this connection, it was decided that the work should begin with an examination and review of existing agreements, taking into account the interests of developing countries and bearing in mind the work undertaken by other organizations. The analytical role of UNCTAD in this respect was later confirmed by the WTO Ministerial Meeting in Singapore, in December 1996. In the light of this mandate, and as a first step towards this longer term goal, the Commission, at its first session, decided to hold this expert meeting, the theme of which is, "to examine and review existing agreements on investment and their development dimension". In this respect, you have been invited to focus on bilateral investment treaties as a first approximation to the broader universe of investment agreements that also includes, of course, regional and multilateral instruments. Given the relevance of bilateral investment treaties for discussions on a possible multilateral investment framework, it is to be hoped therefore that the discussion on bilateral investment treaties will first help improve the understanding of issues relevant to a possible multilateral

investment framework. Secondly, it will allow experts to draw lessons from the development implications of bilateral treaties which may be useful for a possible multilateral investment framework. Thirdly, it will contribute to enhancing the role of developing countries in discussions on investments agreement. And, fourthly, it will inspire the experts to consider ways and means to ensure that the concerns of developing countries are taken fully into account in these discussions.

The Expert Meeting has been structured in such a way as to foster a dialogue. And our task for this three-day meeting is to maximize the opportunity for an in-depth discussion of these issues and to provide expert analysis on the development implications of bilateral investment treaties and their relevance to a possible multilateral investment framework for the Commission to consider at its meeting in September. The newly established Working Group on relations between trade and investment of the WTO is also expecting to benefit from your findings in its future deliberations.

I have just arrived from Paris where I participated in the Ministerial Council Meeting of the OECD. I took part, on Monday, in the discussions about the work that has been undertaken by OECD regarding the negotiations of a plurilateral framework on investment. Our first concrete point of reference is the existence of this process. Of course, its relevance is framed by the fact that it takes place in an organization which has a very specific membership: 29 developed countries. But it is, perhaps, one of the first attempts by the OECD to negotiate something of a universal scope. As you know, from the start the OECD envisaged this initiative not only as a negotiation exercise to be applied within this homogeneous body of countries; it has been seen as an instrument which could be of universal applicability, which would be open for other countries to join in the future.

During Monday's session, we heard the Chairman of the negotiating group, Ambassador Engering from the Netherlands, explain the state of play. We learned that, contrary to original expectations, negotiations are no longer anticipated to end by May this year. Of course it would be difficult to do that, as we only have, I think, two days to go. They have decided to extend somewhat the deadline, by one year. So, there are some expectations among the participants that negotiations will conclude next year. But this could provide interested countries with some breathing space, some more time to consider these issues. There were also very interesting remarks made at the meeting about the difficulties currently faced by the negotiators, particularly in terms of the exceptions. What could be the exceptions permitted, on grounds such as national security or cultural concerns? I think that Mr. Engering mentioned three or four different types of exceptions. The discussion is still continuing over how to tackle this problem of the exceptions; whether it should be solved by granting a general, blanket exception or whether the matter should be taken up case by case, individual country by individual country. Anyway, I mention that to you only to show that the negotiations, although advanced, have still to come up with solutions to some very complex problems.

Besides the OECD the second point of reference, of course, is the work that is going to begin at the WTO in the recent established Working Group. As you know, UNCTAD is pleased that it will have an institutional role in cooperating with this Group - as far as the Group wishes UNCTAD to make a contribution.

It is with this background in mind that I would like to make a few concluding remarks regarding how I see not only the future of the Expert Group but also, in general terms, the role of expert groups in the machinery of UNCTAD.

You are going to examine bilateral investment agreements. And, of course, the bilateral agreements are by definition more specific than the negotiations that are taking place in OECD, or the discussions that are going to take place in WTO. In those two other fora what precisely is envisaged is to try to identify the issues and the solutions that are general in nature. Here, we are dealing with a huge variety and quantity of bilateral agreements. We have identified 1,310 bilateral agreements. So we have an enormous universe of agreements which are, at least in theory, the subject matter of examination here. And, of course, because of this great variety it will sometimes prove difficult to draw those general lessons that could be valid in the discussions of a possible multilateral framework. At the same time, this discussion of the bilateral agreements, being closer to the reality of different countries and to their specific situation - the different levels of social and economic development - of course provides a degree of flexibility and a degree of reality that is sometimes lacking in the more abstract and generic approach. So, I hope that the examination of the bilateral agreements will at least provide you and us with some useful insights about how some of the agreements perhaps serve the interests of development better than others. Of course, we have to be clear what we have in mind when we speak about "the interests of development", in terms, not only, of economic growth but of the integration of countries into an international network of distribution of trade, of technology exchange, and of managerial skills. So, I imagine, that some of the agreements will be better than others from that point of view.

And that brings me to my second comment. I think that one of the most important objectives of this Meeting will be to start a process that could lead us, as far as possible, to identify what have been the best practices in the negotiation of a bilateral agreement - in terms of the interests and perspective of development and to ask ourselves whether those best practices, or those good examples, could be replicated for other developing countries or could, eventually, be used in reference to the negotiations that are going on in OECD, or the discussions that are going to take place in WTO.

So I would urge you to try to come up with practical results from the Meeting: that is, some specific advice, some concrete identification of issues and also some useful suggestions in terms of the continuation of this work. I will give you an example: within the Division we are now considering the possibility of creating a special training course for negotiators of investment agreements. In other words, we feel the need to go a little beyond the seminars that we had in the past. The seminars are useful, but they are, of course, limited. Hence we would like to establish a course to train the negotiators, because we are aware that, on the one hand, people who are dealing with those matters in OECD have been doing this sometimes for ten years: they know exactly what is behind each word. On the other hand, most other countries are only starting to grapple with these subjects.

I had the opportunity in Paris to remind our colleagues in the OECD that we should not repeat in the investment field the mistake that was made with the negotiations on services. I can speak with some personal experience about this because I arrived in Geneva exactly at the beginning, the first year of the Uruguay Round, when the negotiations on services were just starting. For years and years OECD had studied and analysed services. They had negotiated agreements

among themselves and the Chairman of the Trade Committee of the OECD had done very good work in preparing the negotiations on trade and services. But, unlike what we are doing today, there was no similar attempt to prepare developing countries. The consequence was that, between the time the suggestion was made to start negotiations on services and the actual beginning of the negotiations, at least four years were wasted in discussions about the scope of those negotiations. Even after they were started, almost two years of the negotiations, in 1987 and 1988, were spent dealing with purely preliminary issues: for instance, the definition of services. Finally, people decided to give up the attempt to discuss such problems as what statistical data would be useful. So, we should not repeat this kind of mistake, and should start right now in preparing ourselves for what is coming over the next few years.

So I would urge you to come up with the kind of practical advice I mentioned; and, at the same time, to view your role as something that will not be limited to the three days of discussions. That is to say, I see the utility of these Expert Groups as the basis for a network of people who will keep in touch with each other through the missions, and through their governments, in order to give continuity to the work that has been started.

As you know, in the reform of UNCTAD the major idea behind the reform of the intergovernmental machinery was to reduce the number of Commissions - we now only have three - and to reduce the number of informal meetings. At the same time, the idea was to expertise the meetings; to have experts who would prepare the meetings of the Commissions and feed the Commissions with constant inputs. Thus, the role of the expert meetings, as I see it, would not be confined to a few days' discussion but would deal with the follow-up. If we conclude that we should pursue a certain field or engage in some project, it would be the role of the expert meeting to oversee how this would be implemented, to try to identify the difficulties, and feed this information back to the Commission, in order to build a sort of permanent body that could really give some added value to the treatment of the subject. So, it is with this intention in mind that I want to open this first Meeting, with great hopes and expectations for its conclusion. I wish you good luck with your work and your deliberations over the next few days.

Annex II

ATTENDANCE *

1. The following States members of UNCTAD were represented at the meeting:

Algeria
Australia
Bahrain
Belgium
Benin
Brazil
Brunei Darussalam
Bulgaria
Canada
Chile
China
Colombia
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
Ethiopia
Finland
France
Gabon
Honduras
Hungary
India
Indonesia
Iran (Islamic Republic of)
Ireland
Israel
Italy
Jamaica
Japan
Kenya
Lebanon
Lithuania
Luxembourg
Madagascar
Malaysia
Mauritius
Mexico
Mongolia
Morocco
Myanmar
Namibia
Netherlands
Nigeria
Norway
Pakistan
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
Senegal
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Thailand
The Former Yugoslav Republic of Macedonia
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Kingdom of Great Britain and Northern Ireland
United States of America
Venezuela
Viet Nam
Zambia
Zimbabwe

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*/ For the list of participants, see TD/B/COM.2/EM.1/INF.1.

2. The Economic Commission for Africa was represented at the meeting.

3. The following specialized agencies and related organization were represented at the meeting:

International Labour Organisation
World Bank
International Monetary Fund
United Nations Industrial Development Organization
World Trade Organization

4. The following intergovernmental organizations were represented at the meeting:

Agency for Cultural and Technical Co-operation
Arab Labour Organization
European Community
Latin American Economic System
Organisation for Economic Co-operation and Development
Organization of African Unity
Organization of the Islamic Conference
Organization of American States
Permanent Secretariat of the General Treaty on Central American Economic Integration

5. The following non-governmental organizations were represented at the meeting:

General Category

Friends World Committee for Consultation (Quakers)
International Chamber of Commerce
Third World Network
Union of Industrial and Employers' Confederations of Europe
World Confederation of Labour
World Federation of United Nations Associations

Special Category

Consumers International